

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAWN E. WHEAT</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>DURHAM SCHOOL SERVICES</b>	)	
Respondent	)	Docket No. 1,011,187
	)	
AND	)	
	)	
<b>FIDELITY &amp; GUARANTY INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier request review of the November 21, 2005 Award by Special Administrative Law Judge Vincent Bogart. The Board heard oral argument on March 17, 2006.

**APPEARANCES**

Kevin T. Stamper of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The parties stipulated claimant suffered a work-related accident and litigated the nature and extent of claimant's disability. Claimant did not seek a work disability. The Special Administrative Law Judge (SALJ) found the claimant sustained a 12 percent whole person functional impairment.

Respondent requests review of the nature and extent of disability and argues that its medical expert, Dr. J. Mark Melhorn, appropriately utilized the *AMA Guides*<sup>1</sup> and his 6.36 percent whole person functional impairment rating should be adopted. Respondent further argues the SALJ erred in awarding claimant temporary total disability compensation because at regular hearing claimant stipulated she was not seeking such benefits and provided no evidence on that issue.

Conversely, claimant requests the Board to affirm the SALJ's Award.

The sole issue for determination by the Board is the nature and extent of claimant's functional impairment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a bus driver for respondent. Her bus was used to transport the physically handicapped and as part of that service she assisted loading and securing wheelchair bound children onto the bus. Claimant gradually developed numbness in her hands, the right worse than the left. Claimant was diagnosed with bilateral carpal tunnel syndrome and was provided conservative treatment. Surgery was recommended and declined by claimant.

Claimant is no longer employed by respondent but is employed as a seasonal employee driving a dump truck.

At her attorney's request, the claimant was examined by Dr. George G. Fluter on November 3, 2004. He diagnosed the claimant with bilateral upper extremity pain and mild carpal tunnel syndrome. The doctor rated the claimant based upon the *AMA Guides*:

Using table 16 (page 3/57), there is a permanent partial impairment to the right upper extremity of 10% for median nerve entrapment at the wrist, and a permanent partial impairment to the left upper extremity of 10% for median nerve entrapment at the wrist. Using table 3 (page 3/20), there is a permanent partial impairment to the whole body of 6% for the right upper extremity, and a permanent partial impairment to the whole body of 6% for the left upper extremity.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Using the Combined Values Chart (page 322), there is a total permanent partial impairment to the whole body of 12%.<sup>2</sup>

At respondent's request, the claimant was examined by Dr. Melhorn on June 7, 2005. He diagnosed claimant with bilateral mild carpal tunnel syndrome. The doctor rated the claimant based upon the *AMA Guides* and concluded claimant suffered a 6.36 percent whole person functional impairment.

As previously noted, work disability is not an issue in this case. Accordingly, claimant's entitlement to permanent partial disability benefits is based upon her permanent functional impairment as established by competent medical evidence and based on the fourth edition of the *AMA Guides*, if the impairment is contained therein.<sup>3</sup>

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.<sup>4</sup> Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.<sup>5</sup>

Both Drs. Fluter and Melhorn expressed opinions on claimant's permanent functional impairment. Both doctors utilized the *AMA Guides* in determining claimant's functional impairment rating. But the SALJ adopted Dr. Fluter's 12 percent impairment rating. The Board agrees with the SALJ and finds that in this case Dr. Fluter's functional impairment rating is more persuasive. Accordingly, the Board finds claimant has a 12 percent permanent partial whole person functional impairment.

The SALJ's computation of the award included 49.44 weeks of temporary total disability compensation. At the regular hearing, the ALJ recited the stipulations and noted that no temporary total disability compensation had been paid. The ALJ then asked claimant's counsel whether claimant was requesting any temporary total disability compensation. Claimant's counsel responded that he did not believe such compensation was appropriate.<sup>6</sup> No evidence was provided to support an award of temporary total disability compensation and the Board is unable to explain why or how the SALJ was able to determine claimant was entitled to any temporary total disability compensation. At oral argument to the Board, the claimant's attorney said the SALJ might have adopted the time period from the date of claimant's termination until the date she declined surgery.

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<sup>2</sup> Fluter Depo., Ex. 2 at 4.

<sup>3</sup> See K.S.A. 2003 Supp. 44-510e(a).

<sup>4</sup> *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>5</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>6</sup> R.H. Trans. at 5.

Nevertheless, as temporary total disability compensation was specifically not requested, it was inappropriate for the SALJ to order payment.

Moreover, the claimant did not meet her burden of proof to support a finding that she was entitled to an award of temporary total disability compensation and the SALJ's award is modified to deny claimant an award of temporary total disability compensation.

The dissent below has raised the question whether the SALJ was assigned to issue an award in this claim. Nonetheless, because the parties do not question SALJ Bogart's jurisdiction nor object to the procedure employed by the Director in assigning this matter to him, nor object to the lack of advance notice of that assignment, the Board sees no prejudice to have resulted and in this instance chooses not to raise these issues on its own motion.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Special Administrative Law Judge Vincent Bogart dated November 21, 2005, is modified to deny an award of temporary total disability compensation and otherwise affirmed.

The claimant is entitled to 49.80 weeks of permanent partial disability compensation at the rate of \$193.82 per week or \$9,652.24 for a 12 percent functional disability, making a total award of \$9,652.24 which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2006.

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

The undersigned Board Member hereby adopts the majority opinion set forth in *Cervantes v. Safelite Glass Corporation*, No. 1,012,477, (Kan. WCAB April 2006). Highly summarized, the undersigned believes the Board lacks jurisdiction to hear appeals of any Awards issued by Special Administrative Law Judges when there is no documentary evidence contained within the file to substantiate that individual's authority to decide the matter. Accordingly, I would set aside the Award and remand the matter to the ALJ for an immediate determination on the merits.

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BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Vincent Bogart, Special Administrative Law Judge  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director